

Ombudsman ref: 2021-104592

5 May 2023

By email: [REDACTED]

Dear Discloser

I refer to your request for us to review Mark's decision to finalise his investigation of your complaint about the handling of your Public Interest Disclosure (PID). You have outlined 31 reasons why you consider the decision is wrong. Broadly speaking those reasons include:

- the basis on which the investigation was closed was wrong
- you were not provided with procedural fairness
- the basis for our conclusions were not sufficiently identified
- the investigation failed to assess, or ignored, evidence you considered relevant to the findings of the PID investigator
- the investigation failed to address certain aspects of your complaint
- the investigation made errors of law and fact
- the investigation took too long.

Your request was referred to me to decide if we should review the decision. We do not review every decision we make.

To inform my decision on your request for a review, I considered:

- your review request dated 23 March 2023
- aspects of your lengthy email of 10 March 2023
- the decision letter Mark provided on 12 December 2022
- the records of investigation made by Ombudsman staff
- your original complaint.

I also reviewed the materials highlighted in your emails of 18 April 2023. Having carefully considered all of this information, I have decided we will not conduct a review of Mark's decision in relation to your PID handling complaint.

The Office of the Commonwealth Ombudsman (the Office) may finalise an investigation under the *Ombudsman Act 1976* (Ombudsman Act) for many reasons, one of which is that our further involvement in the complaint will not bring about a better or different outcome for the person. I believe this to be the case here.

At its heart, I consider that your request for a review of Mark's decision to finalise your complaint is primarily directed at achieving a reinvestigation of your PID, based on your view that the investigation of your PID was inadequate. Specifically, you asserted that it did not address every allegation in your PID; reached conclusions that did not and do not accord with your consideration of the issues; and its response to findings of disclosable conduct was, in your view, lacking. Based on my

assessment of your request, I think it is unlikely that you would have been satisfied with any other conclusion from this Office save that your PID should be reinvestigated.

As was explained to you at the outset and during our investigation, it is not the role of this Office, when investigating an agency's handling of a PID, to reinvestigate the PID. That is, we do not stand in the shoes of the investigator and assess the evidence afresh. Instead, the PID handling investigation considers whether the conduct of the PID investigation was reasonable and in accordance with the requirements of the PID Act and Standard, and whether the findings can be reasonably supported by the material obtained during the PID investigation. This approach is consistent with the intent of the PID Act as evidenced by the notes that appear under sections 42, 46 and 58 of that Act. We disagree that our role extends to reinvestigation of disclosable conduct contained in public interest disclosures allocated to agencies for investigation.

Most of the reasons you identified for seeking review of Mark's decision relate to your belief that he would have reached different conclusions about the adequacy of the investigation if he had evaluated the evidence – that is, put himself in the shoes of the PID investigator and assessed each piece of evidence. As outlined above, this misunderstands the scope of our investigation and our role. I reviewed the decision letter Mark provided at the conclusion of his investigation and am satisfied that the reasons Mark provided were logical and clearly explained his views about the adequacy of the PID investigation and its findings.

During a PID handling investigation, we may seek further information or make further inquiries of an investigating agency to help us determine questions we have about the conduct of an investigation or its findings. An obligation of procedural fairness arises in relation to the agencies we investigate if we propose to make comments that are expressly or impliedly critical of an agency. I do not agree that receiving this further information gives rise to an obligation to afford you procedural fairness.

Subsection 8(2) of the Ombudsman Act provides that the Office handles complaints in private and as it sees fit. This means we may decide not to investigate every aspect of every complaint we receive. In this instance I consider that the assessment of the issues in your complaint that should be the focus of our investigation was reasonable. I note that the initial investigator advised you about the scope of the investigation at a preliminary stage, including that we may not investigate every aspect of your complaint.

It is not unreasonable for an investigator to consider the Office's inability to direct an agency to take a particular course of action or to achieve a practical outcome for a complainant in determining whether further commitment to a particular investigation is warranted. That the investigator came to a different conclusion about what action was warranted in response to the deficiencies they identified in the PID investigation does not, of itself, mean that the investigator's decision was wrong. I note that the investigation identified deficiencies in the PID investigation that corresponded with some of the issues within your complaint and we advised you that we would bring those deficiencies to the attention of the agency and provide it with comments and suggestions for improvement.

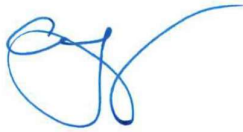
I acknowledge that you first raised your complaint with us in October 2021, and waited a long time for an outcome. Both the initial investigator, and Mark who finalised your PID handling complaint, explained the reasons why the investigation took as long as it did, including the volume of material to be considered and its complexity. Having considered the actions the investigators took I am satisfied that they applied themselves to actioning the investigation properly and reasonably.

I appreciate that you believe that our investigation should have reached different conclusions and should have resulted in this Office taking different action in relation to the investigating agency.

However, for the reasons above I do not agree that it was wrong for the investigator to decide to finalise the investigation on the basis that he did. Further, I consider that the other reasons you put forward in seeking a review misunderstand the nature of our role when investigating PID handling complaints.

Please note that we consider a review request only once unless there is new information or substantially different issues raised. Should you write to us again about this matter, we will consider and retain any further correspondence, but will not reply unless we think it provides new relevant information or raises a new, substantive issue that requires our action.

Yours faithfully

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Carmen
Director

Influencing systemic improvement in public administration